CO-OPERATIVE CENTRAL BANK LTD.

v.

HJ. ROSLI HJ. KAMARUDDIN

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
AJAIB SINGH SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 02-146 OF 1990]
13 FEBRUARY 1991

CONTRACT: *Executive position - Receivership - Whether termination - Right to compensation - Amount of compensation - Definition of dispute - Co-operative Societies Act 1948, s. 49(1).*

STATUTORY INTERPRETATION: *Retrenchment - Compensation claimed under service agreement - Whether 'dispute' - Claim to compensation admitted - Quantum disputed - Co-operative Societies Act 1948, s. 49(1).*

The respondent (R) and the appellant (App) entered into an agreement on 2 September 1986 whereby R was appointed Chief Executive of Corporate Affairs of Business Development & Consumer Affairs of App from 1 September 1986 - this contract was for a period of 5 years and was renewable by either side.

On 7 March 1989, Z & A were appointed as receivers of App and on 31 March 1989, R's services were terminated by Z & A effective from 1 April 1989.

Upon Z & A's request, R submitted his claim for compensation in accordance with clause 23 of the service agreement for all-in salary for unexpired period of 29 months, gratuities, paid leave and car benefits. R did not receive any reply from Z & A. as a result of which R took steps for representation under s. 20 of the Industrial Relations Act 1967; R withdrew his case before the Industrial Court could deal with it. R subsequently commenced the present proceedings.

Although in para. 1 of his originating summons (OS), R claimed damages for the wrongful termination or breach of his employment or right to compensation under the service agreement, the Supreme Court said that based on para. 23 of R's affidavit, the real cause of action in the OS was a claim for the recovery of compensation to which R is entitled under the service agreement; as such the question of wrongful termination did not arise at all.

The App then applied to strike off the OS under O. 18 r. 19 Rules of the High Court 1980, on the basis that it disclosed no reasonable cause of action, whereby Z & A, in their affidavit made a general statement that there was a dispute - they did not explain the nature of the dispute. They stated that the OS was misconceived as the dispute, whether it concerned the wrongful termination and the right to compensation, or the actual amount of compensation, was a dispute concerning the business of App and R, as an employee of the App; as such, R must exhaust the remedies available to him under s. 49(1) of the Cooperative Societies Act 1948 (CSA).

The Supreme Court took the view that as a result of R's OS, App was misled into believing that R's cause of action was based on the alleged unlawful termination of his services. On the other hand, App Counsel P alleged that the dispute was as to the quantum of compensation; in P's view, the question of unlawful termination and the right to compensation did not arise at all.

App's application was dismissed, hence this appeal. The question for the Court was whether a disagreement over the amount of the claim for compensation between App and R amounts to a dispute under s. 49(1) of the CSA.

Held:

[1] On the question of whether there is a dispute, the Court followed the definition of dispute in the *Gujarat State Co-operative Land Dept* case and held that there was as yet no dispute as App had not yet rejected R's claims for compensation; in this case it is the quantum of the claim that is being disputed, not the right to the claim; the appellant and its Counsel both in the lower Courts and the Supreme Court did not challenge the validity of the claim for compensation by R; in fact, App had admitted R's right to the relief.

[2] For s. 49(1) of the CSA to apply, there must be a dispute relevant to the existence of R's right to the relief claimed under the service agreement and not to the quantum of the relief - on the facts in this case there is no dispute as defined in s. 49(1) of the CSA.

[Appeal dismissed.]

Cases referred to:

Gujarat State Co-operative Land Development Ltd. v. P.R. Mankad & Anor. [1979] AIR 1203
Heydon & Anor. v. Bridget Lillis [1907] 4 CLR 1223
M. Arulandan v. Malaysian Co-operative Insurance Society Ltd. [1987] CLJ (Rep) 44
Madhava Rao v. Surya Rao [1954] AIR Madras 103
Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 412

Legislation referred to:

Cooperative Societies Act 1948, s. 49(1)
Industrial Relations Act 1967, s. 20
Rules of the High Court 1980, O. 18 r. 19
Statute Law (NSW) [Aus], s. 59

JUDGMENT

Mohd. Jemuri Serjan SCJ:

This is an appeal from the decision of the High Court dismissing an application of the appellant under O. 18 r. 19 of the Rules of the High Court to strike off the respondent's originating summons. The appeal came up for hearing before us on 25 September 1990 and was dismissed with costs. We indicated that we would give our grounds of judgment later. Here are the grounds of judgment.

The respondent filed an Originating Summons No. R8-24-7-089 in the High Court on 8 January 1990 naming the Co-operative Central Bank Limited (In Receivership) as defendant and claiming *inter alia*:

(a) Damages and/or compensation against the defendants for wrongful termination and breach of the service agreement dated 2 September 1986.

(b) An order that the defendants do pay to the plaintiff a sum of RM638,918.91 and a further sum of RM133,441.50 be paid by the defendants to the Employees Provident Fund Board.

(c) An account of what is due to the plaintiff from the defendants in respect of the tax free benefits as stipulated in clause 9 of the service agreement.

From the affidavits in support of the application filed on behalf of the respondent the following facts emerged.

Haji Rosli bin Haji Kamaruddin was originally employed by the appellant as its assistant general manager on 2 April 1983 and on 1 January 1986 he was promoted as the general manager of the appellant. By 1 June 1986 he was appointed as joint chief executive of the appellant. By a fixed term service agreement dated 2 September 1986 entered into between the respondent and the appellant, the respondent was appointed as the chief executive of corporate affairs, business development & consumer services of the appellant with effect from 1 September 1986. The post of chief executive in fact was a redesignation of his earlier post as general manager. However, the appointment of chief executive was only for a period of 5 years but might be renewed by both sides.

Apart from getting an annual basic salary of RM102,000 at the material time the respondent was also entitled to the development incentive allowance of 0.04% of the nett profit of the appellant before tax, an annual bonus of not less than 2/12 of his basic last drawn salary, a housing allowance of RM2,000 per month and entertainment allowance of RM1,500 per month and a fixed servant allowance of RM350 per month, all of which were to be paid tax free. There was also a provision for the payment of gratuity at the rate of 2/12 of his basic last drawn salary payable at the expiration of the contract.

By an order of the High Court dated 7 March 1989 Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yaffi of Messrs Hanafiah, Raslan, Mohammed & Co., were appointed receivers to, *inter alia*, manage the affairs and property of the appellant whereupon the respondent continued in his employment but as deputy chief executive. However by a letter dated 31 March 1989 his services with the appellant were terminated by the said receivers with effect from 1 April 1989 on the grounds that his employment was inconsistent with the functions, powers and duties of the receivers and accordingly surplused to the requirement of the appellant.

Consequent upon the letter of termination of his services the respondent was requested by the appellant to submit his claims for compensation in accordance with clause 23 of the service agreement which provided that in such a case as this the appellant would compensate the respondent a sum of money equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of the contract as if his services had not been terminated. Accordingly the respondent submitted his claim totalling RM467,318.91 made up of his all-in salary for the unexpired periods of 29 months, gratuities, paid leave and car benefits, but he received no reply to the letter and the claim. Thereupon the respondent took steps to make representation under s. 20 of the Industrial Relations Act 1967 with a view to seeking reinstatement but before the Industrial Court could deal with it, the case was withdrawn. Instead the present originating summons was filed.

In his affidavit the respondent averred that the termination of his employment by the receivers of the appellant was wrong in law, untrue, inaccurate, unreasonable, arbitrary, capricious and contrary to the rules of natural justice, or in other words, the termination was unlawful. It may be recalled that in his originating summons he claimed damages and/or compensation against the appellant for wrongful termination and breach of the service agreement, para. 1 of the originating summons in particular, is relevant. This appears to be the ground for his action by way of the originating summons. Yet in para. 23 of his affidavit he averred that on a proper and true construction of his service agreement he was justly and truly entitled in law to claim damages and/or compensation against the appellant on account of the termination of his services as expressly provided for in the service agreement. The former averment confounded the real cause of his action and we think misled the appellant considerably. On a careful study of his affidavit, it is established that the real cause of action in the originating

summons is not the wrongful termination or breach of, or the right to compensation under the service agreement but a claim for the recovery of compensation to which the respondent is entitled under the service agreement.

This inference is supported by the affidavit of the respondent himself, particularly para. 23 of his affidavit in support of the originating summons. Under clause 23 of the service agreement the respondent is entitled in the event of the termination of his services for reasons other than misconduct on his part in respect of the appellant's business or violation of its rules and regulations or on his conviction for a criminal offence which would render the continuation of his appointment as chief executive an embarrassment to the appellant. Under the circumstances the question of wrongful termination of the respondent's services did not arise at all.

The appellant did not file any affidavit in reply to the affidavit of the respondent but instead filed a summons-in-chambers to strike off the originating summons on the grounds that:

(a) it discloses no reasonable cause of action;

(b) it is scandalous, frivolous and/or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of action;

(d) the action is an abuse of the process of the Court.

In their affidavit in support of the application to strike off the originating summons, the two receivers deposed that the originating summons was misconceived because the dispute was a dispute touching the business of the appellant between the respondent, as an employee and officer of the appellant, and the appellant and because the respondent had failed to exhaust the remedies available to him under the Cooperative Societies Act 1948. The receivers did not in any way explain the nature of the dispute that they referred to in their affidavit apart from making a general statement as to the existence of the dispute. We therefore surmise from their affidavit that the dispute referred to therein must be the dispute concerning the alleged unlawful termination of the respondent's services and his claim for compensation. The appellant was undeniably misled to believe that the respondent's cause of action was based on the alleged unlawful termination of his services and the claim for compensation by virtue of para. 1 of the originating summons and some part of the respondent's affidavit adverted to earlier. Thus Mr. Lazar, learned Counsel for the appellant, in his reply to Mr. V. Kanagalingam emphasised this fact for our benefit.

However, some light was thrown onto this so-called dispute touching the business of the appellant by Mr. P. Jayasingam in his affidavit. He deposed that the appellant did not, at any point in time, question the entitlement of the respondent as an employee of the appellant under the terms and conditions of the contract of employment. What was disputed was the actual amount that was due and payable by the appellant to the respondent following the termination of his services with the appellant. In this respect Mr. P. Jayasingam was referring to a claim in the sum of RM467,380.91 made by the respondent in an earlier proceeding, which claim the appellants and their Counsel disputed, not, however, on the respondent's right to it but on the actual amount claimed. He further stated that such dispute still subsisted even more so in respect of the claim of compensation for the sum of RM772,360.41. He further emphasised that the dispute as to the quantum of the compensation was a dispute touching the business of the appellant and, being such a dispute, it fell to be settled in accordance with the provisions of s. 49(1) of the Act. It would follow that until the matter had been dealt with by the Registrar-General of the Co-operative Societies under that section the High Court had no jurisdiction to hear the originating summons.

In the light of this evidence it is inevitable for us to conclude that the receivers and their Counsel, Mr. P. Jayasingam, viewed the cause of action in the originating summons at cross purposes. When the receivers spoke of the dispute between the appellant and respondent in their affidavit they had in mind the unlawful termination alleged by the respondent and his right to damages or compensation therefrom. On the other hand, their Counsel averred in his affidavit that the dispute they were concerned with was the actual quantum of the compensation, and not the unlawful termination nor the right to compensation under clause 23 of the service agreement. Therefore he was at pains to explain in his affidavit the admission that the respondent spoke of on the part of the receivers and their Counsel in the earlier proceedings was only an admission relating to the respondent's right to the compensation but not an admission to its actual amount. Thus the dispute on the quantum still persisted. As far as the learned Counsel was concerned the question of unlawful termination and the right to compensation did not arise at all, because it was from his point of view, never the issue. In other words, the amount of compensation in the sum of RM467,380.91 which the respondent claimed in the earlier proceedings was never admitted and therefore continued to be rejected by the learned Counsel. This is why in para. 8 of his affidavit Mr. P. Jayasingam said:

> I respectfully say that the plaintiff's contention that the admissions in the earlier proceedings constitute an admission of the plaintiff's claim herein is not tenable on the facts because till the proceedings herein, the plaintiff has not put up any claim in respect of the alleged sum of RM772,360.41.

Although he did not specifically in para. 12 of his affidavit refer to the claim for compensation in the sum of RM772,360.41 in the present originating summons, the logical inference is that he had in mind that same figure and it can safely and reasonably be presumed that he also rejected this claim. Paragraph 12 of his affidavit is as follows:

> I will further respectfully say that on the totality of the matters raised herein, there has always been, and there is still a dispute as to the actual amount that is due and payable by the defendants to the plaintiff, following the termination of his services with the defendants, and this is a dispute touching on the business of the defendants, and involves a member/ officer of a registered society. In consequence, I have advised the defendants that it is incumbent on the part of the plaintiff to very strictly adhere to the provisions of the Co-operative Societies Act of 1948 and the By-laws of the defendants made pursuant thereto.

The only thing that the receivers and their Counsel seemed to agree upon was whatever the nature of the dispute as seen from their respective perspective it was nevertheless a dispute touching the business of the appellant.

On our part having regard to the evidence of the appellant and the respondent in their totality and the provision of clause 23 of the service agreement the respondent's action was actually grounded upon the amount of compensation of RM772,360.41 to which claim he was contractually entitled. It is common ground that the respondent was retrenched when the appellant went into receivership and that his services were not terminated by misconduct or by any other ground stipulated in clause 20 of the service agreement. The compensation for retrenchment is provided for in clause 23 and the amount is equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of contract had it not been for the retrenchment. For the purposes of convenience it is pertinent to reproduce in full clause 20 and clause 23:

> 20. If during the term of this agreement, the executive shall be found to be guilty of any proven misconduct in respect of the bank's business or violation of the bank's rules and regulations or be found guilty of any criminal offence as a result of which the continuation of

the executive in his employment by the bank will be embarrassing to the bank it shall be lawful for the bank to terminate the services of the executive and he may be paid such compensation at the discretion of the board of directors based on the nature of the breach.

23. In the event of the bank terminating the services of the executive for reasons other than as stipulated in clause 20 above, the bank shall compensate the executive by paying him upon such termination a sum of money equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of contract as if he had not been terminated from service.

In the instant case the respondent had asserted that his claim to compensation in the sum of RM772,360.41 was justified but the appellant had not as yet rejected the claim nor challenged the correctness of the computation of the compensation. It was only assumed that they would dispute the figure, considering that in the earlier proceedings they had rejected the claim for a smaller amount. Assuming the appellant rejected the amount of the present claim the question for our determination is whether a disagreement over the amount of the claim for compensation between the appellant and the respondent amounts to a dispute falling within the ambit of s. 49(1).

The appellant had consistently contended that it was such a dispute. Before s. 49(1) can be applied to the facts of the present case two conditions which were stipulated therein must be proved to exist, namely whether:

(a) the respondent was an officer as defined under s. 2 of the Act; and

(b) whether the dispute, if at all, between the appellant and the respondent as such officer, was a dispute touching the business of the appellant.

The appellant contended that not only was the respondent an officer within the meaning of the by-laws of the appellant and Co-operative Societies Act 1948 but he was also a member of the appellant. Similarly the dispute, whether it concerned the wrongful termination and the right to compensation or the actual amount of compensation, was a dispute touching the business of the appellant. Cited as authorities, amongst others, are the following cases: *M. Arulandan v. Malaysian Co-operative Insurance Society Ltd.* [1987] CLJ (Rep) 44; *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* [1983] 1 MLJ 412 and *Madhava Rao v. Surya Rao* [1954] AIR Madras 103. Learned Counsel for the appellant submitted that both conditions following these authorities were satisfied and the appeal therefore should be allowed.

Arulandan v. Malaysian Co-operative Insurance Society (*supra*) is a Supreme Court decision which decided that the manager of the organization and methods department of the society was an officer within the meaning of s. 2 of the Act and the dispute between the manager and the co-operative society on the withholding of his salary increment as a result of a disciplinary action was a dispute touching the business of the society. The Supreme Court in that case applied the decision in *Madhava Rao v. Surya Rao* [1954] AIR Mad 103 which is a decision of the Full Bench of the Madras High Court where it was decided that the term "a dispute touching the business of the Co-operative Society" was to be given a wider interpretation so as to include a dispute relating to the affairs of the society and not to be limited to its business. In that case the dispute concerned the election of the board of directors of the Co-operative Societies Bank between members of the bank. *Professor Dr. A. Kahar Bador v. N. Krishna* (*supra*) is a High Court case concerning the dispute over the validity of the election of the Committee of Management of the Mercantile Co-operative Thrift & Loan Society between some members and the former Committee of Management of the Society.

It was held by Hashim Yeop A. Sani J, (as he then was) that the words "a dispute touching the business of the society" was to be interpreted widely to include the general running of the affairs of the society.

Having regard to the view we take of the issue before us it is not necessary for us to decide whether the respondent was an officer of the appellant for the purpose of s. 49(1). We must, however, perforce decide whether there is in fact a dispute between the parties in the first place. This leads us to the question of what is a dispute. In this regard we were referred by learned Counsel for the respondent to the Supreme Court of India case of *Gujarat State Co-operative Land Development Ltd. v. P.R. Mankad & Anor.* [1979] AIR 1203. Sarkaria J, at p. 1207 defined a dispute in the following terms:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

With respect we do not see any reasons to disagree with this definition of dispute. As we have pointed out earlier on, while the respondent had consistently asserted his claim in the Court below and in previous proceedings in respect of compensation following the termination of his services, the appellant had as yet to reject the amount of the claim. That is enough reason for us to hold that as yet there is no dispute. Even if we are wrong on this score there still remains the question - is a disagreement between the parties over the actual quantum of the compensation claimed, that is the sum of RM772,360.41 a dispute for the purpose of the Act? In other words a distinction must be drawn between a dispute as to the right to the claim and the actual amount claimed and in this case it is common ground that it is the quantum of the compensation that is being questioned. To decide on this dominant issue we find support from the decision of Griffith CJ in the case of *Heydon & Anor. v. Bridget Lillis* [1907] 4 CLR 1223. The facts of this case are as follows. The plaintiffs are the trustees of a building society. The defendant is a executrix of a deceased member of the society, who had mortgaged a piece of land to the society. By the terms of the mortgage the money was repayable by monthly instalments, and, if default was made in the payment of two such instalments, the mortgagees were entitled to enter upon the land. There is no question as to the execution of the mortgage or as to the default, or as to the right to maintain an action ejectment, unless there is something in the Act to prevent them. The defendant objects that the plaintiff's title to sue has not been made out. She bases that objection on three different grounds, the most important being, that under the provisions of the Statute Law of New South Wales such a question cannot be determined by the Supreme Court but must be determined by the District Court. In other words the question of wrong jurisdiction was raised by the defendant. At p. 1242 Griffith CJ, in determining whether there was a dispute for the purpose of s. 59 of the Statute Law of New South Wales said:

> So far as the provision as to disputes is invoked, I am of opinion that the section has no application. For in this case there is no dispute. The main facts were never really disputed. There is some dispute as to how much is actually due, but, in my opinion, a dispute, in order to be relevant for this purpose, must be a dispute relevant to the existence of the right to the relief claimed by the plaintiff. In this case there is no dispute as to any fact affecting the plaintiff's right to recover.

We are of the view that this proposition of law is applicable to the facts of the instant case and we would adopt it. The appellant and its Counsel both in lower Courts and before us did not challenge the validity of the claim for compensation by the respondent under clause 23 of the service agreement but had gone so far as to admit his right to the relief. It follows therefore there is no dispute since for the purpose of s. 49(1) the dispute must be a dispute

relevant to the existence of the respondent's right to the relief claimed under the service agreement and not the quantum of the relief. In the result, applying Griffith CJ's proposition of law in *Heydon's* case we would dismiss the appeal.

Also found at [1991] 2 CLJ 865